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No. 84-1361

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH MOSES LOUD HAWK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether time consumed by appellate review should be excluded from the length of delay relevant under the Speedy Trial Clause of the Sixth Amendment, where the government successfully appealed pursuant to 18 U.S.C. 3731 from orders dismissing the indictment and suppressing evidence, and respondents were free of all restrictions on their liberty during the appeals.

2. Whether delay attributable to respondents' interlocutory appeal should be considered in evaluating their speedy trial claim.

3. Whether, even if time on appeal should be included under the Speedy Trial Clause, respondents' right to a speedy trial has been violated under the test of *Barker* v. *Wingo*, 407 U.S. 514 (1972).

PARTIES TO THE PROCEEDING

In addition to the parties shown in the caption, defendants Russ James Redner, Dennis James Banks, and Darlene Pearl Nichols, also known as KaMook Banks, were appellees below and are respondents herein.

Charges against defendant Leonard Peltier were severed from this action and later dismissed. Defendant Anna Mae Aquash is deceased.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals affirming the dismissal of the indictment on the ground that respondents' right to a speedy trial was violated (Pet. App. 1a-25a) is reported at 741 F.2d 1184. The opinion of the court of appeals addressing respondents' vindictive prosecution claims (Pet. App. 26a-35a) is reported at 682 F.2d 841. The opinion of the en banc court of appeals reversing the district court's suppression order and its order dismissing the indictment with prejudice (Pet. App. 36a-87a) is reported at 628 F.2d 1139. The panel opinion in that appeal (Pet. App. 88a-118a) is unreported. The district court's opinion dismissing the indictment on

speedy trial grounds (Pet. App. 119a-138a) is reported at 564 F. Supp. 691. The district court's orders on the vindictive prosecution motion (Pet. App. 139a-143a, 144a-148a), its bench ruling dismissing the indictment under Fed. R. Crim. P. 48(b) (Pet. App. 149a-151a), and its suppression order (Pet. App. 152a-157a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 158a-159a) was entered on August 30, 1984. A petition for rehearing was denied on January 8, 1985 (Pet. App. 160a). The petition for a writ of certiorari was filed on February 26, 1985, and was granted on April 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

STATEMENT

Respondents were apprehended on November 14, 1975, and charged on December 22, 1975, with unlawfully possessing and transporting dynamite and firearms. Because of protracted litigation over pretrial defense motions, respondents have yet to be tried. Twice, respondents convinced the district court to dismiss all or part of the indictment. Both times, the government prevailed in the court of appeals. Following the last remand, the district court once again dismissed the indictment, ruling that respondents' Sixth Amendment right to a speedy trial had been violated (Pet. App. 119a-138a). The court of appeals affirmed (*id.* at 1a-25a). A summary chronology of the complex proceedings in this case is set forth at Pet. App. 161a.

1. a. On November 13, 1975, the Federal Bureau of Investigation notified Oregon law enforcement authorities that federal fugitives might be traveling through the state in a motor home and station wagon. The FBI's teletype message described both vehicles and provided the license number of the motor home. The next day, Oregon state trooper Griffiths observed two vehicles fitting the FBI's description. After verifying the license number of the motor home, he stopped the vehicle and told its occupants to step outside. Former defendants Peltier and Aquash stepped out of the motor home, followed by respondent KaMook Banks and her infant child. Griffiths was told that no one else was inside. Just then the motor home accelerated quickly and Peltier fled, jumping over a nearby fence and exchanging gunfire with Griffiths. Griffiths then followed the motor home and found it one-half mile from the initial stop, with no one inside.[1] Meanwhile, another state trooper approached the station wagon, which had stopped behind the motor home, and ordered its occupants out of the car. Respondents Redner and Loud Hawk emerged. Both vehicles were locked and impounded while search warrants were obtained. Pet. App. 37a-40a.

Searches of the two vehicles pursuant to state and federal search warrants[2] disclosed 350 pounds of

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[1] The government would introduce evidence at trial showing that respondent Dennis Banks was the driver of the motor home. Banks was not arrested until January 26, 1976.

[2] State warrants were obtained and executed on November 15, 1975. Federal warrants were obtained and executed the following day. Pet. App. 40a & n.3.

dynamite, 6 partially assembled time bombs, and a loaded .44 caliber revolver in the station wagon, and 2600 rounds of ammunition, 150 blasting caps, 9 empty hand grenades, and 13 firearms, 8 of which had obliterated serial numbers, in the motor home. On November 16, 1975, Oregon state law enforcement officers removed the dynamite and destroyed it without consulting federal officials. Pet. App. 40a-42a & n.4, 45a-46a. Photographs were taken of the dynamite and of its detonation (*id.* at 41a, 42a, 47a, 52a).

b. On December 22, 1975, a five-count superseding indictment was returned against respondents in the United States District Court for the District of Oregon (J.A. 151-155). The first three counts charged respondents with unlawful possession and transportation of an unregistered and unnumbered destructive device, including seven cases of dynamite, along with timing devices and detonating materials, in violation of 26 U.S.C. 5861(d), (i) and (j), 5871. Count four charged respondents with unlawfully transporting firearms whose serial numbers had been obliterated, in violation of 18 U.S.C. 922(k).[3] Count five charged Dennis Banks with possession of firearms by a convicted felon, in violation of 18 U.S.C. App. 1202(a).

2. a. On December 24, 1975, respondents filed a motion to dismiss the destructive device charges or, alternatively, to suppress any secondary evidence relating to the dynamite, because of its destruction by the state police. Clerk's Record (C.R.) 17; see

[3] Counts 1 through 4 also charged Peltier and Aquash. Peltier's case was severed and the charges against him later dismissed. Aquash is now deceased.

J.A. 39. On January 21, 1976, on the motion of respondents, the trial was postponed until March 8, 1976 (C.R. 36, 37 39; see J.A. 41-43). The court denied respondents' suppression motion on January 23, 1976 (C.R. 38; see J.A. 43), but thereafter granted their request for reconsideration (C.R. 43; see J.A. 43-44) and ordered a pretrial evidentiary hearing. On respondents' motion and over the objection of the government, trial was again continued until May 12, 1976 (C.R. 62, 64; see J.A. 46).

Hearings on respondents' motion to dismiss or to suppress evidence of the dynamite were held on March 19 and 22, 1976 (C.R. 81, 85; see J.A. 47). The district court granted the motion on March 31, 1976, suppressing "all evidence, tangible and intangible, relating to" the dynamite (Pet. App. 157a). The government filed a notice of appeal from the suppression order on April 19, 1976 (C.R. 115; see J.A. 49), and sought a continuance of the May 12 trial date pending resolution of the appeal (C.R. 120, 121; see J.A. 50). The government repeatedly urged that its right to appeal would be vitiated if it were forced to go to trial before the appeal was decided and without the suppressed evidence (*e.g.*, C.R. 133, 136, 139; 4/26/76 Tr. 5-7; see J.A. 51). The continuance was denied by the district court, and a stay of trial was denied by the court of appeals (see J.A. 1).

When the case was called for trial on May 12, 1976, the government, consistent with its earlier representations, refused to proceed because of the pending appeal (Pet. App. 150a; C.R. 142; see J.A. 51). The district court thereupon dismissed the entire indictment with prejudice, invoking Fed. R.

Crim. P. 48(b).[4] Pet. App. 151a; C.R. 142; see J.A. 51. The government immediately appealed from the dismissal (C.R. 149; 5/12/76 Tr. 12; see J.A. 52). The two appeals were consolidated and ordered to be expedited (see Pet. App. 123a; J.A. 1, 2, 8). Respondents were unconditionally released during the appeal (C.R. 142; see Pet. App. 151a; J.A. 51).

b. The government filed its opening brief on June 28, 1976, and its reply brief on August 2, 1976 (see J.A. 2). The appeal was argued and submitted on October 15, 1976 (Pet. App. 123a; see J.A. 2). A divided panel of the court of appeals affirmed on July 26, 1977 (Pet. App. 88a-118a). The government's petition for rehearing with suggestion for rehearing en banc was filed on September 6, 1977 (see J.A. 3) and granted on October 17, 1977 (Pet. App. 123a; see J.A. 3). The case was reargued to the full court on November 9, 1977 (see J.A. 4). On March 6, 1978, the court of appeals remanded to the district court for an evidentiary hearing on whether federal officials participated in the destruction of the dynamite and whether respondents suffered any prejudice from its destruction (C.R. R-1;[5] Pet. App. 44a-45a, 123a; see J.A. 4). The court of appeals retained jurisdiction over the case and requested findings from the district court within 45 days (C.R. R-1, at 2; Pet. App. 45a). The district court held the hearing on May 9 and 10, 1978 (see J.A. 55)

[4] Fed. R. Crim. P. 48(b) provides:

> If there is unnecessary delay * * * in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

[5] The designation "C.R. R-" refers to the numbering system used in the Clerk's Record after March 1, 1978 (see J.A. 54).

and issued its findings on August 23, 1978 (J.A. 171-174).

On August 7, 1979, the court of appeals, sitting en banc, reversed the suppression order and ordered the dynamite counts reinstated (Pet. App. 36a-87a). The court also determined that while the government could have gone to trial on the firearms counts pending the appeal, the district court erred in dismissing those counts with prejudice (*id.* at 60a-62a). Accordingly, the court ordered that the district court reconsider its dismissal of those counts (*id.* at 62a). Respondents' petitions for rehearing and certiorari were denied on October 1, 1979 (see J.A. 6) and March 3, 1980 (445 U.S. 917), respectively. The mandate of the court of appeals issued on March 12, 1980, 46 months after the government took its appeal from the dismissal of the indictment (Pet. App. 4a; see J.A. 7).

3. a. On remand, the government contended that the firearms counts should be reinstated rather than presented again to a grand jury (4/14/80 Tr. 5). Respondents argued that those counts could not be reinstated (5/12/80 Tr. 6-7). On May 12, 1980, the court ordered the government to reindict on the firearms charges (5/12/80 Tr. 7; see J.A. 57). Following respondents' requests for continuances (C.R. R-41, R-45, R-50, R-51; 4/14/80 Tr. 9-10; 5/12/80 Tr. 14-15; see J.A. 57), the court set trial for September 3, 1980 (5/12/80 Tr. 20; see J.A. 58). Respondents stipulated that the pendency of numerous pretrial motions created excludable delay under the Speedy Trial Act (18 U.S.C. 3161 *et seq.*) running from March 17, 1980, the date the mandate was received, until all of the motions were decided (5/12/80

Tr. 18-19; see J.A. 58).[6] By April 24, 1980, at least 19 pretrial defense motions were outstanding (4/14/80 Tr. 9; C.R. R-33, R-37, R-39; see J.A. 56), and on that date respondents filed a motion requesting another two weeks for the filing of additional pretrial motions (C.R. R-41; see J.A. 57).

The grand jury returned a superseding indictment on June 18, 1980 (J.A. 156-161). The new indictment charged respondents with two of the three original destructive device counts and added two new destructive device counts. It charged respondents with the original firearms count (although it substituted "receiving" for "transporting") and again charged Dennis Banks with being a felon in possession of firearms. The indictment also charged KaMook Banks with a new count of receiving firearms while under indictment, in violation of 18 U.S.C. 922(h)(1).

Respondents filed a number of new motions in response to the superseding indictment (C.R. R-88, R-90, R-92, R-93, R-95-99, R-102, R-103, R-105; see J.A. 61-64), including a motion to dismiss on the ground of vindictive prosecution (C.R. R-97; see J.A. 63). On August 8, 1980, the district court granted the vindictive prosecution motion as to KaMook Banks and denied it as to the other respondents (Pet. App. 139a-143a, 144a-148a). Those respondents filed notices of appeal between August 15 and 22, 1980, and the government noticed an appeal from the dismissal of charges against KaMook Banks on September 2, 1980 (C.R. R-125, R-130, R-133, R-139; see

[6] At the time, the parties were under the misimpression that the mandatory dismissal sanction of the Speedy Trial Act applied to this case. See generally 18 U.S.C. 3163(c); *United States* v. *Watson*, 623 F.2d 1198, 1202 & n.8 (7th Cir. 1980).

J.A. 67-68). The appeals were consolidated and ordered to be expedited (C.R. R-144-146, R-149; see J.A. 14-15, 20-21, 24-25, 28-29, 69). Respondents remained free during the appeal on their own recognizance.

b. Respondents filed their opening brief on October 15, 1980, and the government filed its brief on November 3, 1980 (see J.A. 16). The appeal was argued and submitted on January 7, 1981 (see J.A. 17). On July 29, 1982, the court of appeals reversed the dismissal of the indictment with respect to KaMook Banks[7] and dismissed the interlocutory appeals of the other respondents for want of jurisdiction (Pet. App. 26a-35a; C.R. R-190).[8] Respondents' petitions for rehearing and certiorari were denied on October 5, 1982 (see J.A. 18) and January 10, 1983 (459 U.S. 1117), respectively. The court of appeals' mandate issued on January 31, 1983, 29 months after the appeals were filed (see Pet. App. 5a; J.A. 19).

4. a. With trial set for June 13, 1983 (after one continuance obtained by the government and two ordered by the court on its own motion),[9] the district court, on May 20, 1983, again dismissed the indictment, ruling that respondents' Sixth Amendment right to a speedy trial had been violated (Pet. App. 119a-138a). The court also decided that the delay

[7] The government did not contest the dismissal of the newly added count of receiving firearms while under indictment.

[8] On June 28, 1982, this Court had held that the courts of appeals are without jurisdiction to review interlocutory orders denying motions to dismiss on the ground of vindictive prosecution. *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263.

[9] Pet. App. 125a; C.R. R-196-198, R-223, R-225; see J.A. 71, 73).

violated the Due Process Clause (Pet. App. 129a-130a n.7). The government filed a notice of appeal on June 17, 1983 (see J.A. 78) and unsuccessfully urged the district court to request that the court of appeals expedite the appeal (C.R. R-268, at 2 n.3; 6/30/83 Tr. 14; see J.A. 105). The court of appeals, however, treated the appeal as expedited (see J.A. 32). As before, respondents were free of all restrictions during the appeal. Respondents have not been in custody since early 1976 (Pet. App. 9a, 136a; C.R. 43, 45, 50, 51; see J.A. 43-45).

b. The government's opening brief was filed on August 16, 1983, and its reply brief on September 27, 1983 (see J.A. 34, 35). The appeal was argued on January 4, 1984 (see J.A. 35). A divided panel of the court of appeals affirmed the dismissal on August 30, 1984 (Pet. App. 1a-25a).

The court applied the four-part balancing test set forth in *Barker* v. *Wingo*, 407 U.S. 514, 530-533 (1972), assessing the length of the delay, the reasons for the delay, respondents' assertion of their right to a speedy trial, and the degree of prejudice to respondents. The majority counted the entire 90 months from the November 1975 arrests until the May 1983 dismissal as the relevant period of delay, including the entire length of time expended on the two earlier appeals, which consumed 75 of those 90 months (Pet. App. 11a). In counting the time on the government's appeals, during which charges had been dismissed, the court distinguished *United States* v. *MacDonald*, 456 U.S. 1 (1982), which held that the Speedy Trial Clause does not apply to periods when charges have been dismissed, on the ground that the dismissal in *MacDonald* was voluntary, while here the dismissals were over the government's objections (Pet. App.

8a). The court did not find it significant that respondents "were not incarcerated or subjected to other restrictions on their liberty during the time when the indictments had been dismissed" (*id.* at 9a).

Assessing the reasons for the delay, the majority counted against the government the court's own lengthy delay in deciding the first appeal (Pet. App. 12a-13a). The court found postponement of trial on the firearms counts "wholly unnecessary" and therefore weighed the appeal time heavily against the government with respect to those counts (*id.* at 12a). With respect to the dynamite counts, the court found that the government's appeal of the suppression order was clearly justified and that the delay was largely attributable to the court's own processes, a "neutral" reason that it weighed against the government, although not heavily (*id.* at 13a). The court purported to weigh the time spent on the second appeal against neither the government nor the defendants, although it did not excuse the delay, except for the six months spent on respondents' frivolous certiorari petitions (*id.* at 14a-15a). The court considered the 23 months that the appeal was before it a reasonable time, involving "no * * * undue delay" (*id.* at 15a).

The majority also found that respondents had adequately asserted their right to a speedy trial by demanding a trial at the time the government was appealing the suppression order, by moving to dismiss on speedy trial grounds following the first round of appeals, and by objecting to continuances following the last remand (Pet. App. 15a). Finally, although the majority acknowledged that respondents had not suffered prolonged incarceration, it did find prejudice resulting from the pendency of unresolved charges and a slight amount of prejudice resulting from the

deaths and fading memories of some witnesses (*id.* at 16a-17a). Balancing all of these factors, and concluding that "[t]he most weighty factor by far is the length of delay" (*id.* at 17a), the majority held that respondents' Sixth Amendment right had been violated (Pet. App. 18a). The court did not address respondent's due process claim.

In dissent, Judge Wallace concluded that *United States* v. *MacDonald*, *supra*, required exclusion from the length of delay of the time when no live indictment was outstanding (Pet. App. 19a-23a). Nor did he count the period during the interlocutory appeals by the respondents other than KaMook Banks (*id.* at 24a). He concluded that the remaining time, between six months and one year for the various respondents, did not violate the Speedy Trial Clause (Pet. App. 24a-25a).

SUMMARY OF ARGUMENT

Respondents were apprehended in November 1975 and charged soon thereafter. As a result of respondents' extensive pretrial motion practice and ensuing appeals by both sides, the government has thus far been unable to bring them to trial. Although the government had prevailed on every appeal, respondents have now reaped the windfall of a dismissal of the indictment predicated on the time consumed by the court of appeals in correcting the errors committed by the district court at respondents' behest.

A. This result cannot be squared with the values underlying the Speedy Trial Clause. The correct constitutional rule is the one adopted by Congress in the Speedy Trial Act (18 U.S.C. 3161 *et seq.*)—the delay occasioned by pretrial appeals should be excluded from the relevant length of delay. This rule recog-

nizes that pretrial appellate proceedings generally result from a defendant's own pretrial motions. Those motions, which in principle seek to enforce the rights of the accused, are themselves often used by the defense as a device to delay trial. Whatever their motivation in a particular case, however, the defendant can hardly fail to be aware of the time that must be expended by the district court to decide them and by the court of appeals to review them when such review is available prior to trial. Especially where, as here, the government obtains a reversal on appeal, the time consumed by appellate review cannot reasonably be the foundation for a defendant's subsequent claim of a violation of his right to a speedy trial.

Any other result would seriously injure society's interest in fair trials reaching just verdicts, which Congress has determined requires that the government be permitted to appeal in the circumstances specified in 18 U.S.C. 3731. The different nature of trial and appellate proceedings and the different causes for delay at the two levels mandate different treatment under the Speedy Trial Clause. Because of the length of time necessarily consumed by appellate review, including that time in the constitutional balancing test under *Barker* v. *Wingo*, 407 U.S. 514 (1972), would turn virtually every pretrial appeal into a presumptive Sixth Amendment violation. Just as the Double Jeopardy Clause does not stand as a bar to retrial following appellate review, so the Speedy Trial Clause should not require dismissal of an indictment on account of such review. If appellate delay is a significant problem for the criminal justice system, it is best addressed by legislation or local court rules prescribing mandatory time periods for appellate decisions, not by ad hoc constitutional decisionmaking.

This Court's decision in *United States* v. *MacDonald*, 456 U.S. 1 (1982), also establishes that the Speedy Trial Clause was not violated in the circumstances of this case. The indictments against respondents had been dismissed and remained so while the appeals were pending; there accordingly were no pending charges that could be speedily tried. In addition, respondents were not subject to any actual restraints on their liberty during the appeals. Accordingly, the Speedy Trial Clause does not apply to those periods. Finally, the time consumed by respondents' own interlocutory appeal obviously cannot be considered as delay supporting their speedy trial claim.

B. As an alternative to excluding appeal time entirely from the analysis, the time might be included in the first instance but then either excused or counted against the defendant under the second *Barker* factor, the reasons for the delay. Although this approach, if properly applied, may lead to appropriate results, we think it less desirable than a blanket exclusion of time (which would include an exception for truly egregious circumstances). It would waste judicial resources to require courts to undertake the full *Barker* balancing inquiry in every case, when the results would be the same as if appeal time had not been included at all, thus not triggering analysis of the other factors. A general rule simply excluding this time from consideration—as opposed to a rule finding a presumptive constitutional violation each time an appeal is taken—would promote both efficiency and consistency.

C. Even if appeal time is included in the analysis and weighed against the government, the other *Barker* factors conclusively demonstrate that no constitutional violation occurred in this case. Respondents have demonstrated no prejudice and have utterly failed to assert their right to a speedy trial in any meaningful fashion. Rather, they have consistently sought, with obvious success, to delay their trial as long as possible. It truly would distort the Speedy Trial Clause to reward respondents for their tactics by the dismissal of the indictment with prejudice.

ARGUMENT

THE DELAY ATTRIBUTABLE TO APPELLATE REVIEW OF RULINGS ON PRETRIAL DEFENSE MOTIONS DID NOT VIOLATE RESPONDENTS' SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL

In this case, respondents were apprehended in November 1975 transporting a substantial arsenal of firearms, ammunition, and explosives, much of which it was illegal for them to receive, possess, or transport. Although respondents were promptly indicted, the government has thus far been unable to bring them to trial on the rather straightforward charges growing out of this incident, due largely to respondents' repeated and partially successful efforts to avert or delay trial and to prevent the government from utilizing all of its available evidence in prosecuting those charges.[10] More than six of the seven and one-

[10] As a glance at the district court docket entries (J.A. 38-145) will reveal, what should have been a relatively simple proceeding has been confounded by a barrage of defense motions, seeking among other things such relief as the appointment of a Native American judge (J.A. 45), the transcription of future grand jury proceedings (J.A. 41), the use of a larger courtroom (J.A. 50), and the dismissal of the indictment on such grounds as the composition of the grand and petit juries (*ibid.*), governmental misconduct (J.A. 64), abuse of the grand jury process (J.A. 72), and burdensomeness of the litigation (*ibid.*).

half years of pretrial delay in this case (from indictment to the time of the district court's speedy trial dismissal) are attributable to appeals taken by the government from orders erroneously dismissing the indictment and suppressing evidence, an unsuccessful interlocutory appeal taken by three of the respondents from the denial of their motion to dismiss, and respondents' unsuccessful petitions for rehearing and certiorari. Respondents have now—in what we regard as the ultimate irony—been rewarded with a ruling by the court of appeals that their constitutional right to a speedy trial was violated by the appellate litigation growing out of their various legally erroneous claims.

The court of appeals has seriously erred in applying the standards established by this Court for assessing claims under the Speedy Trial Clause and in so doing has adopted a particularly harmful rule for treating pretrial appeal time under the Sixth Amendment. Under the rule advocated by respondents and applied by the court of appeals, virtually every pretrial appeal by the government or by a defendant potentially will violate the Constitution and will require the courts to engage in the full-blown, ad hoc balancing test necessary to adjudicate colorable Sixth Amendment claims. Such a rule offers only the prospects of unnecessary litigation leading to further delays and the windfall of a dismissal of charges with prejudice to a defendant who in all likelihood desires not a speedy trial but merely to manipulate the system to his own advantage. Nothing in the Speedy Trial Clause or in this Court's prior decisions requires such an untoward result. To the contrary, the concerns underlying the constitutional guarantee of a speedy trial, as set forth by the Court,

require that pretrial appeal time be excluded from the Sixth Amendment analysis.

In *Barker* v. *Wingo*, 407 U.S. 514 (1972), this Court established a balancing test to evaluate claims under the Speedy Trial Clause. The Court identified (407 U.S. at 530; footnote omitted) four relevant factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." The Court arrived at this flexible approach in recognition of certain fundamental differences between the right to a speedy trial and other constitutional rights that protect criminal defendants (*id.* at 519). First, "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused" (*ibid.*). Prompt trials and punishments serve deterrent and rehabilitative goals and diminish defendants' opportunities to negotiate guilty pleas to significantly reduced charges or otherwise take advantage of backlogs and large caseloads. These and other concerns make it important to society, sometimes more so than to defendants, that the accused be expeditiously brought to trial (*id.* at 519-521).

Second, delay, which is of course "not an uncommon defense tactic," "may work to the accused's advantage" (407 U.S. at 521).[11] With the passage of

[11] As Congress noted (S. Rep. 93-1021, 93d Cong., 2d Sess. 14 (1974)) in passing the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*:

> Only very rarely is it in the defendant's interest to seek a speedy trial, for in most cases that is the last thing he wants. Most defendants realize that delay inures to their benefit while speedy trial may mean speedy incarceration of the guilty.

time, the prosecution may find it more difficult to carry its burden of proof or more worthwhile to use its limited resources on cases of more immediate concern. Thus, unlike violations of other constitutional rights, infringement of the right to a speedy trial does not inherently prejudice a defendant's case (*ibid.*).

Finally, the Court stressed (407 U.S. at 521; footnote omitted) the amorphous quality of the speedy trial guarantee: "It is * * * impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate." Accordingly, a "functional analysis" (*id.* at 522) is required, taking into account the "particular context" (*ibid.*) in which the delay has occurred. In this regard, the Court reiterated its prior observation that " 'the ordinary procedures for criminal prosecution are designed to move at a deliberate pace' " (*id.* at 521 n.15, quoting *United States* v. *Ewell*, 383 U.S. 116, 120 (1966)). And the Court emphasized the necessity to interpret the Speedy Trial Clause in light of society's interests, not just the defendant's:

> "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice."

Id. at 522, quoting *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905); see also *United States* v. *Ewell*, 383 U.S. at 120.

While the court of appeals purported to apply the balancing test set forth in *Barker*, it did so blindly, failing to take account of the principles on which this

Court relied as the basis for the test itself. The court of appeals' fundamental error lies in its failure to exclude the time attributable to pretrial appeals from the length of delay relevant under the *Barker* test. But the court of appeals also erred in its analysis of each of the other factors to be considered, as well as in its balancing of all of the circumstances. This case, notwithstanding the significant time that has passed, presents a compelling record against a finding that respondents' speedy trial right has been violated. The court of appeals' dismissal of the indictment in this case is "a distortion and abuse of the right to a speedy trial." *United States* v. *Litton Systems, Inc.*, 722 F.2d 264, 272 (5th Cir. 1984), cert. denied, No. 83-1550 (May 14, 1984).

A. Time Consumed By Pretrial Appeals Should Not Be Included In The Computation Of The Length Of Delay Relevant Under The Speedy Trial Clause

1. a. In the Speedy Trial Act (18 U.S.C. 3161 *et seq.*), Congress sought "to make effective the sixth amendment right to a speedy trial." S. Rep. 93-1021, 93d Cong., 2d Sess. 1 (1974). Thus, although compliance with the Act is not dispositive (see 18 U.S.C. 3173), " 'it will be an unusual case in which the time limits of the Speedy Trial Act have been met but the sixth amendment right to a speedy trial has been violated.' " *United States* v. *Saintil*, 705 F.2d 415, 418 (11th Cir.), cert. denied, 464 U.S. 855 (1983), quoting *United States* v. *Nance*, 666 F.2d 353, 361 (9th Cir.), cert. denied, 456 U.S. 918 (1982).

Congress determined in the Act that delay from interlocutory appeals and from appeals of indictment dismissals should be entirely excluded in calculating the relevant length of delay for bringing a defendant to trial. 18 U.S.C. 3161(d)(2) and (h)(1)(E); see

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United States v. *Hernandez*, 724 F.2d 904, 906-907 (11th Cir. 1984); *United States* v. *McGrath*, 613 F.2d 361, 366 (2d Cir. 1979), cert. denied, 446 U.S. 967 (1980). In referring to delays for proceedings concerning the defendant, of which interlocutory appeals are a part, Congress stressed that "it would indeed be anomalous to permit the defendant to benefit from delay proper[l]y undertaken to protect his interests in a fair adjudication of the charges against him by allowing dismissal without exclusion of that time." S. Rep. 96-212, 96th Cong., 1st Sess. 9 (1979); see also H.R. Rep. 93-1508, 93d Cong., 2d Sess. 34 (1974) ("a defendant should not profit doubly from delay he is responsible for").

b. These concerns—which echo those expressed more generally by the Court in *Barker* (see pages 17-18, *supra*)—apply equally under the Speedy Trial Clause. Pretrial appellate proceedings typically arise out of defense motions to dismiss indictments or to suppress evidence. Such motions, which invoke "the many procedural safeguards provided an accused" (*United States* v. *Ewell*, 383 U.S. at 120, quoted in *Barker* v. *Wingo*, 407 U.S. at 521 n.15), necessarily contemplate a measure of delay in their resolution at the trial court level. Indeed, the rule is that time spent in connection with the trial court's consideration of defense motions does not give rise to a Sixth Amendment violation:

> Having sought the aid of the judicial process and realizing the deliberateness that a court employs in reaching a decision, the defendants are not now able to criticize the very process which they so frequently called upon.

United States v. *Auerbach*, 420 F.2d 921, 924 (5th Cir.), reh'g denied, 423 F.2d 676 (1969), cert. denied, 399 U.S. 905 (1970); see also, *e.g.*, *United States* v. *Litton Systems, Inc.*, 722 F.2d at 270; *Scarbrough* v. *State*, 76 Wis. 2d 87, 250 N.W.2d 354, 360-361 (1977); cf. 18 U.S.C. 3161(h)(1)(F).

The same principle should apply with even greater force on appeal. Where defense motions are successful although possibly erroneous, society's interest in the fair and accurate resolution of criminal charges may dictate that the government be permitted to appeal; such appeals, because of the constraints imposed by the Double Jeopardy Clause, must take place prior to trial. Because these proceedings have as their purpose the protection of vital interests of both the defendant and society and because they have been set in motion by the defense, the Speedy Trial Clause should be, as the Speedy Trial Act is, tolled during their pendency. See *United States* v. *Jackson*, 508 F.2d 1001, 1004 (7th Cir. 1975) ("In calculating the length of delay, * * * the period of delay attributable to review of an order appealable under 18 U.S.C. § 3731 should not be considered."); *United States* v. *Bishton*, 463 F.2d 887, 890 (D.C. Cir. 1972); *United States* v. *Herman*, 576 F.2d 1139, 1146 (5th Cir. 1978).[12] Respondents caused most of

[12] See also *United States* v. *Litton Systems, Inc.*, 557 F. Supp. 568, 571 (S.D. Miss. 1983), rev'd on other grounds, 722 F.2d 264 (5th Cir. 1984), cert. denied, No. 83-1550 (May 14, 1984); *United States* v. *Sebastian*, 428 F. Supp. 967, 975 (W.D.N.Y.), aff'd, 562 F.2d 211 (2d Cir. 1977); *State* v. *Helenbolt*, 334 N.W.2d 400, 405 (Minn. 1983); see generally *Barber* v. *Scully*, 731 F.2d 1073, 1074 (2d Cir. 1984) (delay caused by defendant's proceeding to prevent state from taking hair sample not chargeable to prosecution); *United States* v. *DiMuro*, 540 F.2d 503, 516 (1st Cir. 1976) (18 month delay pending Supreme Court's decision in another case on controlling legal issue did not violate the Sixth

the delay in this case by filing legally erroneous motions. Having set the judicial process in motion, they should not now reap the windfall of a dismissal under the Speedy Trial Clause predicated on the resultant delay. See *United States* v. *Jones*, 524 F.2d 834, 852 (D.C. Cir. 1975) (defendant must share responsibility for delays caused by consideration of his own pretrial motions); *Torres* v. *Florida*, 477 F.2d 555, 556 (5th Cir. 1973) ("It would be extremely difficult to charge the state with failure to try an accused while the accused is himself seeking a writ to prohibit such a trial."); cf. *INS* v. *Rios-Pineda*, No. 83-2032 (May 13, 1985), slip op. 5-6 (time accrued during appeals of immigration orders did not count toward seven years of residency required to be eligible for suspension of deportation).

Including appeal time within the length of delay under the Speedy Trial Clause is especially inappropriate where, as here, the government has been successful on appeal. Having induced the trial court to err, respondents are in a poor position indeed to claim that their constitutional rights have been violated by the time needed for the government to obtain correct legal rulings from the court of appeals. If this time is to be included at all, it should be weighed against respondents. See *United States* v. *Brown*, 520 F.2d

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Amendment). But see *Atkins* v. *Michigan*, 644 F.2d 543, 548 (6th Cir.), cert. denied, 452 U.S. 964 (1981) (defendant incarcerated during appeal); *United States* v. *Brown*, 520 F.2d 1106, 1109 (D.C. Cir. 1975) (defendant incarcerated during part of delay and considerable unjustified delay in trial court); *Chism* v. *Koehler*, 392 F. Supp. 659 (W.D. Mich. 1975), aff'd on opinion below, 527 F.2d 612 (6th Cir.), cert. denied, 425 U.S. 944 (1976) (defendant incarcerated during appeal); *Day* v. *United States*, 390 A.2d 957 (D.C. 1978) (appeal not expedited).

1106, 1130-1131 (D.C. Cir. 1975) (MacKinnon, J., dissenting from denial of rehearing en banc). As the court stated in *People* v. *Jamerson*, 198 Colo. 92, 97, 596 P.2d 764, 768 (1979):

> Defendant's original motion to dismiss was not legally sustainable * * *. He cannot now use the fact that a trial court erroneously upheld his position to predicate an argument that an unreasonable delay took place because the prosecution appealed and obtained a reversal of the erroneous ruling.

See also *State* v. *Sieckmann*, 3 Or. App. 454, 459-460, 474 P.2d 367, 370 (1970) ("[s]ince defendant's motion to dismiss the original indictment was without merit, * * * and the resulting erroneous order of dismissal was the cause of the state's appeal, the defendant must share responsibility for the delay"); *State* v. *White*, 118 Ariz. 47, 56, 574 P.2d 840, 849 (Ct. App. 1977) (defendant's motion "is made in the context of the possibility of an appeal by the State if it is granted").[13]

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[13] We do not mean to suggest that appellate delay may never violate a defendant's constitutional rights. Where the government has intentionally sought delay to obtain an advantage that undermines the fundamental fairness of the proceeding, due process concerns would be raised. See *United States* v. *Lovasco*, 431 U.S. 783 (1977); *United States* v. *Marion*, 404 U.S. 307 (1971). Indeed, in an extreme case, the values underlying the Speedy Trial Clause might be so plainly implicated that appellate time could result in a Sixth Amendment violation. Such a result might obtain where a defendant who is incarcerated pending an appeal by the government from an order suppressing material but not crucial evidence is unable, despite clearly expressed and sincere requests presented to the court of appeals, to obtain a decision from that court within a time period that is reasonable in light of the

2. a. The conclusion that pretrial appeal time must be excluded under the Speedy Trial Clause is reinforced by considering the importance of the government's right to appeal and the different nature of appellate proceedings from those in the trial court. The time attributable to government appeals from pretrial orders cannot be subjected to the strictures of the Speedy Trial Clause without severely impairing the government's right to appeal under 18 U.S.C.

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issues presented on the appeal. Cf. *United States* v. *Herman*, 576 F.2d at 1146.

In fashioning an exception to the general rule of exclusion of appellate time, the defendant's ability to preserve his claims for post-conviction review must be kept in view. Where a defendant sincerely desires to go to trial, it may often be appropriate to ask that rulings on any motions to dismiss the indictment or to suppress evidence be deferred until after trial, thus obviating the need for the government to take an interlocutory appeal. See generally *United States* v. *Scott*, 437 U.S. 82, 100 n.15 (1978); *United States* v. *Ceccolini*, 435 U.S. 268, 271 (1978). Even where a defendant seeks and obtains a favorable ruling before trial and an ensuing appeal remains under advisement for an inordinately long period, the defendant may still be able to secure a speedy trial by entering into a stipulation to withdraw his claim until after trial.

Respondents obviously cannot take advantage of any exception in this case, for they were not incarcerated and failed to assert in the court of appeals any right to a speedy trial while the appeals were pending. Moreover, the length of time consumed by the court of appeals in deciding the first two appeals, while considerable, may not have been wholly unreasonable in view of the complexity of the issues, necessitating several lengthy opinions, the grant of en banc review, a remand to the district court for further factfinding, and the delay that may have been occasioned while awaiting this Court's decision in *United States* v. *Hollywood Motor Car Co.*, *supra*, which was dispositive of the second appeal.

3731 [14] and creating substantial practical difficulties. The government has a vital interest in securing appellate review of district court orders dismissing indictments or suppressing evidence, a concern of "public justice" (*United States* v. *Ewell*, 383 U.S. at 120) that may not be ignored under the Speedy Trial Clause (see page 18, *supra*). Because of double jeopardy considerations, such review can, of course, take place only prior to trial. Yet the "deliberate pace" (*Ewell*, 383 U.S. at 120) of the criminal process is, with good reason, especially unhurried at the appellate stage. See *United States* v. *Bishton*, 463 F.2d at 890 ("the function of appellate courts necessarily casts the delay attendant upon their deliberations in a somewhat different light"); see also *Harrison* v. *United States*, 392 U.S. 219, 221-222 n.4 (1968) (delays on appeal resulted from "the need to assure careful review of an unusually complex case").

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[14] 18 U.S.C. 3731 provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence * * *, not made after the defendant has been put in jeopardy * * *, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> The appeal in all such cases * * * shall be diligently prosecuted.

It would therefore make little sense to require that the appellate process proceed with the speed required of trial courts by the Sixth Amendment. Cf. *Doescher* v. *Estelle*, 454 F. Supp. 943, 949-950 (N.D. Tex. 1978) (no Sixth Amendment right to a speedy appeal). The rule adopted by the court below could force the government to seek writs of mandamus from this Court to compel the courts of appeals to issue decisions once cases have been pending on appeal for a significant period (although when an undue period would be about to elapse would be purely a matter of conjecture). This unhappy and impractical result is hardly required, as the court below apparently believed (Pet. App. 13a), by this Court's reference in *Barker* v. *Wingo* (407 U.S. at 531) to delay caused by "overcrowded courts." Taken in context, that statement plainly referred to trial court congestion and not to delay on appeal, where more time is spent reviewing legal issues than in waiting for a hearing date on a crowded calendar. Moreover, the Ninth Circuit overlooked a critical distinction in equating its own delays with delays due to trial court congestion—the latter are caused by circumstances beyond a defendant's control, whereas the appeals here were necessitated entirely by the need to review respondents' legally erroneous contentions in order to ensure due protection of their rights. In sum, where the government has, in good faith, taken an appeal under 18 U.S.C. 3731, the resulting delay should be excluded under the Speedy Trial Clause.[15] See generally *United States ex rel. Mitchell* v. *Fairman*, 750 F.2d 806, 808-809 (7th Cir. 1984) (22 months on appeal of suppression order not weighed against the state because "the state had every right to appeal" and "the appeal was not taken just for purposes of delay").

[15] The court of appeals faulted the government for refusing to go to trial on the firearms counts during the pendency of the appeal of the district court's order suppressing evidence of the dynamite (Pet. App. 12a; see page 5, *supra*). But the government acted in good faith, and surely had no reason to anticipate that the court of appeals would take over three years to decide the appeal. While the suppressed evidence was not as critical to the firearms counts as it was to the dynamite counts, it was still quite material to proving that all respondents were engaged in a joint activity and that those respondents traveling in the station wagon had constructive possession of the firearms found in the motor home. Moreover, the firearms counts had not been severed from the dynamite counts—without a severance, the government would have had to go to trial on all counts, thereby losing its right to appeal the suppression order with respect to the dynamite counts as well. Cf. 18 U.S.C. 3161(h)(7) (exclusion of time under the Speedy Trial Act where defendants are joined for trial and no severance motion has been granted). Accordingly, the time on appeal cannot weigh against the government, especially where the government was successful in reversing the district court's dismissal with prejudice. See generally *United States* v. *Saintil*, 705 F.2d at 418 (where government made a good faith mistake in interpreting district court's order, the delay attributable to its appeal should not be weighed heavily); *Jones* v. *Commonwealth*, 495 Pa. 490, 434 A.2d 1197 (1981) (delay attributable to prosecution's unsuccessful interlocutory appeal did not violate speedy trial guarantee). Even if the period on the first appeal should be included with respect to the firearms counts, there is absolutely no reason to include that period with respect to the dynamite counts, where the government's appeal was concededly necessary because crucial evidence had been suppressed (Pet. App. 12a-13a).

b. Other policy concerns also counsel in favor of excluding pretrial appeal time under the Speedy Trial Clause. In explaining the appropriate treatment of

the length of delay under the Speedy Trial Clause, the Court in *Barker* described (407 U.S. at 530) this factor as a kind of "triggering mechanism." Once the delay has become "presumptively prejudicial" (*ibid.*), a court must go on to evaluate and balance all of the relevant considerations. While the amount of delay that may be tolerated without triggering the full *Barker* balancing analysis varies with such circumstances as the seriousness of the charged offense (*id.* at 530-531), the courts of appeals have regularly considered delays of from six to 18 months sufficiently troubling to provoke application of the complete balancing test. See, *e.g.*, *United States ex rel. Fitzgerald* v. *Jordan*, 747 F.2d 1120, 1127 (7th Cir. 1984) (eight months); *United States* v. *Jenkins*, 701 F.2d 850, 856 (10th Cir. 1983) (16 months); *Cain* v. *Smith*, 686 F.2d 374, 381 (6th Cir. 1982) (11 and one-half months); *Isaac* v. *Perrin*, 659 F.2d 279, 282 (1st Cir. 1981) (ten months); *United States* v. *Avalos*, 541 F.2d 1100, 1111 (5th Cir. 1976), cert. denied, 430 U.S. 970 (1977) (15 months); *United States* v. *Simmons*, 536 F.2d 827, 831 (9th Cir.), cert. denied, 429 U.S. 854 (1976) (six months); cf. *United States* v. *Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555, 565 (1983) (18 months sufficient to trigger further balancing where *Barker* test was applied to assess delay in returning property under the Due Process Clause).

It is not uncommon, however, for a single pretrial appeal to consume a year or more from the time of the district court's decision until return of the court of appeals' mandate, and indeed sometimes much

more than that.[16] The rule adopted by the court of appeals in this case thus would turn virtually every prosecution necessitating a pretrial appeal into a presumptive Sixth Amendment violation, requiring a complete analysis and balancing of the *Barker* factors. Such a result makes very little sense indeed. From a flexible guarantee of both defendants' and society's right to a speedy trial, the court of appeals has fashioned a rule that will operate to inhibit substantially the effective correction on appeal of error below.[17]

This Court has concluded that the "sound administration of justice" precludes an interpretation of the Double Jeopardy Clause that would impose the "high price * * * [on] society" of granting "immunity from [retrial] because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States* v. *Tateo*, 377 U.S. 463, 466

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[16] This is especially true where the issues are important or difficult, as they often are in cases where the Solicitor General has authorized an appeal. See, *e.g.*, *United States* v. *Accardo*, 749 F.2d 1477 (11th Cir. 1985), reh'g pending, No. 82-5380 (three years); *United States* v. *Morgan*, 743 F.2d 1158 (6th Cir. 1984), cert. denied, No. 84-1357 (Apr. 22, 1985) (two years); *United States* v. *Thompson*, 710 F.2d 1500 (11th Cir. 1983), cert. denied, 464 U.S. 1050 (1984) (three years); *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983) (two years); *United States* v. *DiBernardo*, 552 F. Supp. 1315 (S.D. Fla. 1982), appeal pending, No. 83-5295 (11th Cir.) (two years).

[17] Records maintained in the Office of the Solicitor General indicate that the federal government takes an average of about 90 pretrial appeals in criminal cases each year and that it completely or partially prevails in about three-quarters of such appeals.

(1964).[18] The same is true of the Speedy Trial Clause—the threat of indictment dismissals, carrying with it the curtailment of the government's opportunities to seek correction of reversible error, is too high a price to achieve the goal of expediting the appellate process. Were it otherwise, defendants would be able to obtain through the Speedy Trial Clause the very immunity from correction of error that they are denied under the Double Jeopardy Clause. As the Court observed in *United States* v. *Ewell*, 383 U.S. at 121:

> It has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events. * * * [This rule] has been thought wise because it protects the societal interest in trying people accused of crime, rather than granting them immunization because of legal error at a previous trial, and because it enhances the probability that appellate courts will be vigilant to strike down previous convictions that are tainted with reversible error. These policies, so carefully preserved in this Court's interpretation of the Double Jeopardy Clause, would be seriously undercut by [an] interpretation of the Speedy Trial Clause [that raised a Sixth Amendment obstacle to retrial following successful attack on a conviction].

[18] See also *United States* v. *Jorn*, 400 U.S. 470, 480 (1971) (opinion of Harlan, J.) (in view of "the scheduling problems arising from case overloads, and the Sixth Amendment's requirement that the single trial to which the double jeopardy provision restricts the Government be conducted speedily, it becomes readily apparent that a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide").

c. If undue appellate delay were a serious and systemic problem (and neither the court below nor respondents have shown that it is), the most effective tool for its amelioration would be legislation or judicial rulemaking, not constitutional adjudication. As Congress stated in passing the Speedy Trial Act (S. Rep. 93-1021, *supra*, at 15), "[q]uite clearly, the [constitutional] case-by-case approach cannot, and should not be expected to solve the problem of court delays." Cf. *Baker* v. *Wingo*, 407 U.S. at 523 (Court has no constitutional basis for requiring trial within specified time period). Should Congress find that appellate delay does present significant problems for the criminal justice system, it is free to modify the Speedy Trial Act to include, rather than exclude, appeal time or to pass a separate "Speedy Appeal Act." Indeed, Congress already requires appeals in certain contempt proceedings to be decided within 30 days (28 U.S.C. 1826(b)). Alternatively, the courts of appeals could adopt their own local rules for the speedy disposition of appeals. Cf. *Barker*, 407 U.S. at 523, 530 n.29 (courts of appeals may adopt local speedy trial requirements); *Abney* v. *United States*, 431 U.S. 651, 662 n.8 (1977) (courts of appeals may cope with delay resulting from permissible interlocutory defense appeals "by rules or policies giving such appeals expedited treatment" and by "establish[ing] summary procedures * * * to weed out frivolous claims"). These approaches would far more effectively and sensibly address appellate delay than would a necessarily ad hoc constitutional approach that penalizes the prosecution and grants windfalls to defendants without addressing the underlying causes

of delay or providing a mechanism for overcoming them.[19]

3. A further reason for excluding pretrial appeal time in this case lies in the rule established by this Court in *United States* v. *MacDonald*, 456 U.S. 1 (1982): where an indictment has been dismissed and the defendant is not subject to actual restraints on his liberty, the Speedy Trial Clause does not apply. In *MacDonald*, the Court held that the Speedy Trial Clause did not apply to the period between the government's dismissal of charges and the defendant's indictment more than four years later. "Once charges are dismissed," the Court held, "the speedy trial guarantee is no longer applicable" (456 U.S. at 8; footnote omitted). This rule applies here to exclude the time on the government's appeals: no charges were outstanding against respondents during these periods, for the indictment had been dismissed by the district court, and respondents were unconditionally released during the appeals.[20] The government could not have tried respondents during these periods no matter how dearly it wanted to do so. See *Arnold* v. *McCarthy*, 566 F.2d 1377, 1383 (9th Cir. 1978) (following dismissal of indictment, defendant was not an "accused" who could demand a speedy trial); *Smith* v. *Colman*, 528 F.2d 1362, 1364 (5th Cir. 1976); cf.

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[19] Moreover, the Due Process Clause remains an appropriate constitutional protection against invidious appellate delay.

[20] The periods that should be excluded on this ground extend from May 12, 1976, when the indictment was dismissed as to all respondents, until the superseding indictment was returned on June 18, 1980, and, as to KaMook Banks, from August 8, 1980, when the superseding indictment against her was dismissed, until January 31, 1983, when the court of appeals' mandate issued.

Klopfer v. *North Carolina*, 386 U.S. 213 (1967) (speedy trial guarantee applied where indictment was not discharged and case could be restored to docket on prosecutor's request). Hence, the Speedy Trial Clause does not apply.[21] Respondents' claim should have been analyzed instead under the Due Process Clause. See *MacDonald*, 456 U.S. at 7; *United States* v. *Lovasco*, 431 U.S. 783 (1977); pages 43-44 note 26, *infra*.

The court below erred in distinguishing *MacDonald* on the ground that the government's dismissal of charges there was voluntary, while here the indictment was dismissed over the government's objection (Pet. App. 8a-9a). This Court's reasoning in *MacDonald* is fully applicable to the circumstances of this case (456 U.S. at 8-9):[22]

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[21] The *MacDonald* rule does not apply, of course, where a formal indictment remains outstanding or a defendant is actually under arrest or other restrictions and thus is still being held to answer criminal charges. See *MacDonald*, 456 U.S. at 6-9; *Dillingham* v. *United States*, 423 U.S. 64 (1975); *United States* v. *Marion*, 404 U.S. at 320-321. Accordingly, where the government appeals from an order that does not dismiss the indictment (such as an order suppressing evidence) or where a defendant is incarcerated or otherwise held to answer pending appeal, the rule established by *MacDonald* would not be controlling.

[22] It is incorrect to characterize the Army's decision not to court-martial MacDonald as a voluntary dismissal by the prosecution. The decision was reached after an adversary proceeding under Article 32 of the Uniform Code of Military Justice at which Army prosecutors urged that charges be preferred and MacDonald prevailed in his contention that there was insufficient basis for trial of the charges against him. See 456 U.S. at 4-5, 10 n.11. In any event, the Court nowhere suggested that its holding might be limited to voluntary dismissals. Indeed, the Court indicated its intent that the holding apply to all dismissals, including those

The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

Once charges are dismissed, * * * the formerly accused is, at most, in the same position as any other subject of a criminal investigation. Certainly the knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life. This is true whether or not charges have been filed and then dismissed. * * * But with no charges outstanding, personal liberty is certainly not impaired to the same degree as it is after arrest while charges are pending. * * * Following dismissal of charges, any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone openly subject to a criminal investigation.

There were no live indictments outstanding against respondents during the government's appeals, and respondents were not subject to any restraints on their liberty. The government's appeals exposed respondents to the same "public obloquy, stress and

entered over the government's objection. The Court stated (456 U.S. at 7 n.7) that its "holding agrees with the determination made by Congress in enacting the Speedy Trial Act of 1974 * * * that if charges are initially dismissed and later reinstated, the period between the dismissal and the reinstatement is not to be included in computing the time within which a trial must commence. 18 U.S.C. §§ 3161(d), 3161(h)(6)." Section 3161(d) expressly applies to dismissals on the motion of a defendant, where an indictment dismissed by the district court is reinstated following appeal or new charges are brought based on the same conduct.

anxiety" that would have been caused by any public knowledge of the government's interest in or consideration of criminal charges against them. Even where it is clear that the government intends to reindict or otherwise to pursue the case, the Speedy Trial Clause does not apply. See *United States ex rel. Mitchell* v. *Fairman*, 750 F.2d at 808 (Speedy Trial Clause not applicable to period between time when grand jury returned "no bill" and time when another grand jury indicted defendant); *United States* v. *Samples*, 713 F.2d 298, 301-302 (7th Cir. 1983) (Speedy Trial Clause not applicable to period between dismissal of indictment for improper venue and reindictment). Simply put, if there are no pending charges that can be tried, the Sixth Amendment does not require the impossibility of trying them speedily.

In sum, even if the delay attendant upon some interlocutory appeals, such as of suppression orders, were properly subject to evaluation under the Speedy Trial Clause, the Clause has no application here, where no charges were pending against the defendants during the pendency of the appeals.

4. The time consumed by a *defendant's* pretrial appeals must be excluded under the Speedy Trial Clause for many of the same reasons already discussed with reference to government appeals. Delay caused by defendants in their own appeals plainly cannot later be used by them to support a dismissal on Sixth Amendment grounds. As the court reasoned in *Hill* v. *Wainwright*, 617 F.2d 375, 377 (5th Cir. 1980) (emphasis in original), such delay is "occasioned by [the defendant's] own pleadings and reiterated appellate petitions insisting, not that he be tried, but that he be *not* tried and that instead the charges be dismissed." The appropriate rule was stated by the court in *Esperti* v. *Wainwright*, 447 F. Supp.

1289, 1294-1295 (M.D. Fla. 1978): while a defendant does "not waive his speedy trial claim by seeking appellate relief prior to trial, * * * the delay therefrom does not increase any accrued delay." See also *Harrison* v. *United States*, 392 U.S at 221-222 n.4 (defendant's claim that he had been denied a speedy trial by lengthy delays on successful appeals he had taken from earlier convictions was "wholly without merit"); *United States* v. *Bizzard*, 674 F.2d 1382, 1386 (11th Cir.), cert. denied, 459 U.S. 973 (1982); *United States* v. *Hill*, 622 F.2d 900, 909 (5th Cir. 1980); *Dandridge* v. *United States*, 265 F.2d 349, 350 (D.C. Cir. 1959); *In re Williams*, 393 N.E.2d 353 (Mass. 1979). The court of appeals thus clearly erred in failing to exclude from the length of delay the more than two years attributable to the interlocutory appeal taken by respondents (other than KaMook Banks) of the district court's denial of their motion to dismiss for vindictive prosecution.[23]

B. Even If Time On Appeal May Be Included Within The Length Of Delay, It Should Ordinarily Be Excused Or Counted Against The Defendant When The Reasons For The Delay Are Considered

We have argued above that the time consumed by appellate review of rulings on defense motions should simply be automatically excluded from the length of delay relevant under the first factor of this Court's

[23] Although the court of appeals purported not to weigh this time against the government (Pet. App. 15a), it did count the time within the length of delay, to which the court gave virtually dispositive force (see *id.* at 17a). The time spent on the appeal before the court of appeals should have been counted against respondents or, at a minimum, entirely excused, as was the time attributable to respondents' frivolous certiorari petition following the dismissal of their appeal for want of jurisdiction under *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982).

four-part *Barker* v. *Wingo* balancing test, as Congress has decreed in the Speedy Trial Act. An alternative approach that may, if properly applied, lead to acceptable results is to count this time as part of the delay, while ordinarily excusing it entirely or else, in appropriate circumstances, counting it against defendants when considering the second factor set forth in *Barker*, the reasons for the delay.[24]

Although this approach may at first blush seem in some sense more intellectually satisfying than not including pretrial appeal time as part of the relevant delay at all, it suffers from several flaws that diminish both its usefulness and its coherence. In the first place, it would turn virtually every pretrial appeal into a presumptive speedy trial violation (see pages 28-29, *supra*). Not only would such a result defy logic, it would increase the burdens on the courts, thereby contributing to further delays, by requiring them routinely to engage in the complete ad hoc *Barker* balancing test. Moreover, an undue emphasis on the length of delay could lead to errors in the balancing such as that committed by the courts below in this case.

More fundamentally, the prescribed balancing would in the vast majority of cases simply be an

[24] The time spent on pretrial *defense* appeals, for example, should be weighed against defendants, especially where, as here, the issue on which they appealed may be reviewed following conviction. The approaches followed by the lower courts in excusing time or weighing it against a party have not been entirely consistent. By excusing a time period, we mean that it should be subtracted from the relevant length of delay. By weighing a time period against a defendant, we mean not only that the period should be subtracted from the length of delay, but also that the defendant's burden of demonstrating a constitutional violation should be increased, as it is when he fails to seek a speedy trial in the first place.

exercise in futility. If the reasons for the delay are accurately considered, appellate delay will virtually never violate the Speedy Trial Clause. The result thus will be the same as if the time had simply never been included at all. That being so, there is no point to requiring the full balancing test every time an appeal is taken. As the court stated in *United States* v. *Mann*, 291 F. Supp. 268, 274 (S.D.N.Y. 1968), in discussing the demand-waiver rule:

> If [the failure to demand a prompt trial] alone could be decisive in every case, it would be at least a needlessly lavish use of judicial energies to bypass it and work through a detailed appraisal of all the other circumstances as grounds for decision.

Since the rule we advocate admits of an exception in egregious cases (see pages 23-24 note 13, *supra*), there is no need to require the full balancing test in all circumstances merely to leave open the possibility of such an exception in those rare instances where its application might be appropriate.

Contrary to respondents' contention (Br. in Opp. 29), the exclusion of appeal time is consistent with the balancing approach set forth in *Barker*. The reasons that we have set forth in support of a general exclusion of appellate delay are the very ones on which we would rely in any particular case to excuse the delay as part of the *Barker* balancing test. It would be more efficient, and lead to far greater regularity of results, for the Court, after considering all of the relevant factors, to conclude that the balance tips so clearly in favor of excusing appellate delay that it should simply be excluded from the analysis altogether.[25]

[25] The alternative case-by-case approach would indeed require "a needlessly lavish use of judicial energies" (*Mann*, 291 F. Supp. at 274). One student commentator has suggested a four-factor balancing test merely to evaluate the reasons for appellate delay; the result of this difficult test would itself then become but a single factor in another four-factor balance, the one prescribed by *Barker* v. *Wingo*. See Note, *The Sixth Amendment Speedy Trial Guarantee: Delay Resulting From Interlocutory Appeals*, 60 B.U. L. Rev. 664 (1980); see also *United States* v. *Herman*, 576 F.2d at 1146 ("at least three factors" must be considered in assessing reasons for appellate delay). We submit that nothing in the Speedy Trial Clause justifies such an elaborate undertaking.

C. Even If The Delay In This Case Is Counted And Weighed Against The Government, The Absence Of Prejudice To Respondents And Their Failure To Assert Their Right To A Speedy Trial Demonstrate That No Sixth Amendment Violation Occurred

Although the length of delay is but one of four relevant factors, the court of appeals gave almost conclusive weight to it (Pet. App. 17a). We have argued above that a substantial portion of the delay in this case—75 out of a total of 90 months—should simply be excluded altogether from the speedy trial analysis or else excused or weighed against respondents; but even if it is included and weighed against the government, its significance must be substantially discounted by consideration of the other two factors, prejudice and assertion of the right to a speedy trial (*Barker*, 407 U.S. at 531-533).

1. Prejudice to respondents is almost entirely absent here. In view of the fact that respondents "were incarcerated only for short periods, and were released without restriction during almost all of the period of delay" (Pet. App. 16a), the court below was able to conclude only that respondents had suffered "some" personal prejudice (*ibid.*). The court's conclusion (*id.* at 16a-17a) that respondents had suf-

fered prejudice to their defense by the deaths and fading memories of witnesses is wholly speculative and ignores the simplicity of the underlying facts in this case. Respondents were apprehended in the very act of committing the crimes with which they were charged and in possession of the principal items of evidence that would be used to prove the government's case. Whatever prejudice has been caused by the passage of time has been to the government's detriment, not respondents'.

Even if there were some possibility of meaningful prejudice to the ability to mount an effective defense, that is an assessment that can be reliably made only after trial. See *United States* v. *MacDonald*, 435 U.S. 850, 858-859 (1978) ("Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative. * * * [P]rejudice can be better gauged" after trial.); *United States* v. *Litton Systems, Inc.*, 722 F.2d at 270-271. Not only would such an approach allow more informed inquiry into the degree of any prejudice suffered by respondents, it would also have saved substantial further amounts of time in bringing them to trial.

2. The final factor, and the one that conclusively demonstrates the absence of a constitutional violation here, is respondents' obvious desire to avoid trial. The Court emphasized the importance of a defendant's desire to obtain a speedy trial in *Barker* v. *Wingo* (407 U.S. at 532, 536):

> We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.
>
> * * * * *

> [B]arring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates * * * that the defendant did not want a speedy trial.

This case presents just such a record. Cf. *Look* v. *Amaral*, 725 F.2d 4 (1st Cir. 1984) (31 month delay did not violate Speedy Trial Clause where defendant failed to inquire into status of case during that period).

a. The court of appeals' conclusion (Pet. App. 15a) that respondents had adequately asserted their right to a speedy trial is entirely untenable, and the factors on which the court relied in reaching its conclusion are insubstantial. The court pointed first (*ibid.*) to respondents' expressed desire to go to trial on May 12, 1976 (see J.A. 169). At that time, however, critical evidence against respondents had been erroneously suppressed and a trial would have defeated the government's right to appeal the suppression order. Moreover, the government had already clearly stated that it would not proceed to trial on that date because of the pending appeal (see page 5, *supra*), and respondents therefore knew that they would not be going to trial at that time. Their purely gratuitous and pro forma demands that the case proceed do not demonstrate an actual desire to go to trial and therefore are entitled to no weight. See, *e.g.*, *United States* v. *Jackson*, 508 F.2d at 1004; see also *Barker*, 407 U.S. at 529.

The court of appeals relied next (Pet. App. 15a) on respondents' motions to dismiss the indictment on speedy trial grounds following the first appeals. Through these motions, however, respondents did not seek a speedy trial. Rather, they sought—as they

have throughout the proceedings—to avoid trial. Finally, the court of appeals relied (*ibid.*) on respondents' objections to continuances following the last remand to the district court. These objections might be considered in evaluating subsequent delay in the district court (delay which thus far is not of constitutional dimension), but they do not indicate that respondents had adequately asserted their rights with respect to earlier periods. Evidence of respondents' belated desire to go to trial in 1983 cannot call into question the propriety of the time already consumed by the appeals.

b. It is obvious from the record that, far from seeking trial at the earliest possible date, respondents were from the very beginning doing everything in their power to delay facing a trial (where, in light of the strength of the government's case, they would have little chance of prevailing). In addition to filing a plethora of pretrial motions at the beginning of the case as well as after each remand (see page 15 note 10, *supra*), respondents sought and obtained two continuances of the trial date during 1976 and attempted to obtain a third (C.R. 36, 37, 39, 62, 64; see C.R. 139; see J.A. 41-43, 46), and again sought continuances following the court of appeals' remand in 1980 (see pages 5, 7, *supra*). Respondents also opposed or failed to join in the government's attempts to expedite the appeals (C.R. R-268, at 2 n.3; 8/12/80 Tr. 192-193). Had respondents wanted sincerely and effectively to assert their right to a speedy trial, they would have pressed the court of appeals to decide the case more expeditiously. Instead, they sat on their rights and bided their time, perhaps hoping that the appeals may have been overlooked or that the delay would ripen into a Sixth Amendment violation. Cf. *Look* v. *Amaral*, 725 F.2d at 6-8 (defendant apparently hoped that the state had forgotten about his case or that he would eventually obtain a dismissal on speedy trial grounds).

Most telling are respondents' petitions for rehearing and certiorari following the court of appeals' ruling in favor of the government as to KaMook Banks and dismissal of the other respondents' appeals on the vindictive prosecution claim. That respondents would continue to seek interlocutory appellate review following this Court's dispositive decision in *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982) (per curiam), holding that such relief is not available, irrefutably demonstrates respondents' manifest desire to avoid trial.

In sum, the court of appeals' affirmance of the dismissal of the indictment in this case for violation of the Sixth Amendment cannot be squared with any value underlying the Speedy Trial Clause. See generally *United States* v. *Litton Systems, Inc.*, 722 F.2d at 272 (to hold that defendant's speedy trial right had been violated "would be a distortion and abuse of the right to a speedy trial under the Sixth Amendment, which was never intended to protect those who do everything in their power to delay or defeat the holding of a trial as long as possible").[26]

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[26] The district court also held that respondents' due process rights had been violated (Pet. App. 129a-130a n.7). Although the court of appeals did not reach this issue, in the interest of preventing further delay and because resolution of the issue is so clear, we submit that it would be appropriate for this Court to rule that there was no due process violation. The Due Process Clause protects the fundamental fairness of the proceeding; in this context, prejudice to the defense and the reasons for the delay are especially important. See *United States* v. *Lovasco*, 431 U.S. at 790, 796. Here, prejudice to

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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respondents was minimal at best, and most of the delay was caused by respondents' own pretrial motions and the resulting appeals. On these facts, the district court's ruling that respondents were entitled to dismissal of the indictment under the Due Process Clause is legally insupportable.

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